Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rule to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

To: The Commission

DOCKET FILE COPY ORIGINAL

APPLICATION FOR REVIEW

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November 20, 1995

QUESTIONS PRESENTED AND FACTS WARRANTING REVIEW

1. Should the Wireless Telecommunications Bureau make substantive policy and rule changes in an "Erratum" without public participation?

2. Should the Wireless Telecommunications Bureau make substantive policy and rule changes without explaining the basis for those changes?

3. Should the Wireless Telecommunications Bureau effectively eliminate all quantitative coverage requirements in the 900 MHz SMR service so that applicants may warehouse spectrum or otherwise acquire spectrum for anticompetitive reasons?

To ensure the rapid deployment of 900 MHz SMR service and the efficient use of the spectrum, the Commission's rules require MTA licensees in this service to meet certain coverage standards: Within three years MTA licensees must provide service to at least one-third of the population in the MTA and within five years licensees must provide coverage to at least two-thirds of the population in the MTA or demonstrate "substantial service" to the license area. Prior to November 8, 1995, there was no similar "substantial service" alternative to the three-year quantitative coverage requirement.

On November 8, 1995, the Wireless Telecommunications Bureau issued, without notice or public comment, the "Second Erratum" in this proceeding. In the "Second Erratum," the Bureau substantially changed the 900 MHz SMR coverage requirements by providing that licensees could, in lieu of providing service to one-third of the population in the license area after three years, provide written notification to the Commission of the licensee's intent to show substantial service five years after license grant. Thus, in the "Second Erratum," the Wireless Telecommunications Bureau effectively eliminated the only fixed quantitative coverage benchmark in the Commission's 900 MHz SMR rules.

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To: The Commission

APPLICATION FOR REVIEW

RAM Mobile Data USA Limited Partnership ("RMD"), pursuant to Section 1.115 of the Commission's Rules, hereby submits this Application for Review of the "Second Erratum," issued on November 8, 1995, by the Wireless Telecommunications Bureau (the "Bureau"), in the above-captioned proceeding.

In the "Second Erratum," the Bureau states that it is "clarifying" the coverage requirements for MTA licensees in the 900 MHz Specialized Mobile Radio ("SMR") Service. It is clear, however, that the "Second Erratum" effects a substantial change in the Commission's rules and policies regarding the 900 MHz SMR service. It reverses the plain meaning of the rule as originally written; ignores prior published decisions stating the purpose of this rule; and undermines a fundamental goal of the Commission's auctions to discourage the warehousing of spectrum. At very least, the changes made in the "Second Erratum" should have been subject to notice and comment rulemaking procedures. In the absence of such a proceeding and any reasoned explanation for such a reversal of prior rule and policy, the rule changes contained in the

"Second Erratum" are arbitrary and capricious and should be rescinded immediately.

DISCUSSION

1. The "Second Erratum" Made A Significant Change To The Commission's 900 MHz SMR Rules.

In the Second Report and Order and Second Further Notice of Proposed Rule Making in these proceedings, the Commission promulgated certain coverage requirements for licensees in the 900 MHz SMR service. Specifically, Section 90.665(c) provided that:

> MTA licensees in the 896-901/935-940 MHz band must, within three years, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA within five years or, alternatively, submit a showing to the Commission demonstrating that they are providing substantial service.

Thus, the rule allowed licensees to satisfy the coverage requirement in either of two ways: (1) the licensee could serve one-third of the population of the MTA within three years and two-thirds within five years; or (2) the licensee could serve one-third of the population within three years and make a showing after five years demonstrating that it was providing "substantial service." In either case, however, it was clear from the rule that MTA licensees in this service were required to provide service to at least one-third of the population within three years of license grant.

The coverage requirements outlined above are critical to ensure that 900 MHz SMR spectrum is used efficiently. As both Congress and the Commission have recognized, there is an inherent risk that licenses awarded through competitive bidding will be acquired by parties which intend to hold the spectrum for anticompetitive reasons (*e.g.*, to exclude a competitor or competing service from the market).[1] The coverage requirements in the Second Order and

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[1] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312 (1993), 47 U.S.C. § 309(j)(4)(B) (requiring the Commission to "include performance requirements ... to prevent stockpiling or warehousing of spectrum by licensee or permittees, and to promote investment in and rapid deployment of new technologies and services" to the public); Amendment of the Commission's Rule to Establish New Personal Communications Services, 9

Second Further Notice of Proposed Rule Making were addressed precisely to this problem.[2]

Several parties petitioned the Commission for reconsideration of the coverage rule on the ground that the standards required therein were overly harsh.[3] In rejecting these requests, the Commission explained that the coverage "benchmarks are not too stringent, particularly in light of the 'substantial showing' mechanism designed for specialized users, who may not be able to meet the two-thirds requirement due to individualized circumstances."[4] Thus, again, the Commission indicated its clear understanding that the "substantial service" alternative was only available at the end of five years.

On October 20, 1995, when the Commission released on its own motion the Third Order on Reconsideration in the same docket, the Commission reiterated that the "substantial service" showing was intended to be a "mechanism designed for specialized users who may not be able to meet the two-thirds coverage requirement."[5] By negative implication the Commission confirmed that the "substantial service" mechanism would provide no relief to those "specialized users" who could not meet the three-year, one-third coverage benchmark. No other interpretation of the Commission's 900 MHz SMR coverage rule was permissible based on the text of the rule or the Commission's several pronouncements regarding it.

It also should be recognized that among the rules that have been promulgated for 900 MHz service, no issue has received more comment or attention than the issue of coverage requirements. At every stage of the process,

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FCC Rcd 4957 (1994) (finding construction requirements necessary for PCS to "ensure that PCS service is made available to as many communities as possible and that the spectrum is used effectively").

[2] Second Report and Order and Second Further Notice of Proposed Rule Making, 10 FCC Rcd 6884 ¶ 42 (1995) (coverage rule intended to "discourage applicants who have a limited ability to provide coverage within an MTA from seeking MTA licenses for anticompetitive reasons").

[3] See, e.g., Petition for Partial Reconsideration of Advanced Mobilecomm, Inc. at 2-4 (filed June 5, 1995) (coverage requirement "too stringent and unworkable"); Petition for Partial Reconsideration of Personal Communications Industry Ass'n at 6-8 (filed June 5, 1995) (same). RMD itself suggested that lower, but quantitatively definitive coverage requirements (one-quarter after three years, one-third after five years) would be appropriate. See RMD's Comments on Petition for Reconsideration and Clarification at 4 (filed July 27, 1995).

[4] Second Order on Reconsideration and Seventh Report and Order, PR Docket No. 89-553, *et al.* (rel. Sept. 14, 1995) ¶ 31.

[5] Third Order on reconsideration, PR. Docket No. 89-553, *et al.* (rel. Oct. 20, 1995) ¶ 2.

going back even before the idea of auctions was considered,[6] construction requirements has been a hotly contested issue. After Notices and Further Notices, Orders and Orders on Reconsideration, the Commission, by means of an "Erratum," cannot completely rewrite the rule.

Nonetheless, on November 8, 1995, the Bureau issued the "Second Erratum," without notice or public comment, purportedly to "clarify" the 900 MHz SMR coverage requirements.[7] In fact, the "Second Erratum" radically changed those requirements. In the "Second Erratum," the Bureau determined that, in lieu of providing service to one-third of the population of the service area within three years, an MTA licensee could, alternatively, "provide written notification that it has elected to show substantial service to the MTA five years from license grant."[8] Thus, under the Bureau's new rule, licensees need not, at the three or five-year mark, meet any quantitative coverage benchmark. Far from merely "clarifying" existing standards or correcting incidental grammatical or punctuation infelicities, the rule change in the "Second Erratum" represents a significant shift in policy regarding the coverage requirements for 900 MHz SMR licensees.

2. The Rule Change Effected In The "Second Erratum" Should Have Been Promulgated With Full Public Participation Using Notice And Comment Procedures.

By making a substantial change in the rules or, in effect, promulgating a new "rule"[9] in an "Erratum," without public participation, the Bureau has violated a fundamental principle of administrative law. Under Section 553 of the APA, agencies must, with few exceptions, provide notice and an opportunity to comment before promulgating a final rule.[10]

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6 See Notice of Proposed Rule Making, PR Docket No. 89-553, 4 FCC Rcd. 8673 (1989).

7 Second Erratum, PR Docket 89-553, *et al.* (rel Nov. 8, 1995). Between October 20, 1995, and November 8, 1995, the Commission issued an "Erratum" in which it made minor modifications to the coverage rule. It is not clear whether the changes made in the "Erratum" were intended to address this issue.

8 Second Erratum, PR. Docket No. 89-553, *et al.* (rel. Nov. 8, 1995).

9 A "rule" is the "whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

10 5 U.S.C. § 553(b).

One of the exceptions to the notice and comment requirement is that agencies may issue "interpretive rules" without public participation.[11] The changes made to the 900 MHz SMR coverage requirements in the "Second Erratum," however, exceed what may be done in an "interpretive rule." Although the distinction between rules or statements that are subject to the notice and comment requirements of § 553 and rules or statements that are exempt from those procedures is sometimes open to interpretation, it is clear that a rule which effectively amends a prior rule is "legislative" and must be promulgated pursuant to notice and comment procedures.[12] Given the Commission's clear and consistent interpretation of the coverage rule prior to November 8, 1995, the changes made in the "Second Erratum" can be viewed only as an amendment to that rule, fully subject to the notice and comment requirements of Section 553.

Agencies also are permitted to make minor corrections to rules without employing notice and comment procedures. Under Section 553(d) of the APA, agencies are required to publish final rules at least thirty-days in advance of their effective date, in part, to allow the rulemaking agency time to discover and "correct error and oversight."[13]

> Congress presumably intended that these corrections be made before the rule took effect, which necessarily implies that the corrections would proceed without the delay entailed in prior notice and comment. The use of the phrase "correct error or oversight," however, suggests that Congress contemplated only minor or technical corrections of obvious errors, for which public comment would be unnecessary. It does not suggest that Congress meant to authorize summary ... policy reevaluations or substantive revisions of [rules].[14]

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[11] 5 U.S.C. § 553(b)(A). The APA also provides for an exemption from the notice and comment requirement where the procedures would be "impractical, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (the "good cause" exemption). There is no reason to believe that there was good cause in this case to abandon notice and comment procedures. Indeed, because of the Bureau's silence regarding the reasons for the changes made in the "Second Erratum," see Section 3, infra, it is unclear whether there was any "cause" underlying the new rule.

[12] American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); Orengo Caraballo v. Reich, 11 F.3d 186, 196 (D.C. Cir. 1993).

[13] S. Doc. No. 248, 79th Cong., 2d Sess. 197 (1946) (cited in Holmes, Paradise Postponed: Suspensions of Agency Rules, 65 N.C. L. Rev. 645, 680 (Apr. 1987)); see also Sannon v. United States, 460 F. Supp. 458, 467 (S.D. Fla. 1978).

[14] Holmes, supra, at 680.

As demonstrated above, the "Second Erratum" did far more than correct "minor or technical" errors. Instead, it made a substantive change in the rules applicable to 900 MHz SMR service. Such changes far exceed the Bureau's latitude for summary modifications using "errata."

By circumventing APA notice and comment procedures in this matter, the Bureau has undermined the foundation upon which administrative law stands. The "notice and comment requirements are essential to the scheme of administrative governance established by the APA."[15] Public participation in agency rulemaking proceedings provides to agencies information and ideas necessary for sound decisionmaking, and allows members of the affected public to present their views and protect their own interests.[16]

> Finally, and most important of all, highhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action. Charting changes in policy direction with the aid of those who will be affected by the shift in course helps to dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation.[17]

The rule changes effectuated in the "Second Erratum" do not fit within any of the exceptions to the notice and comment requirements of the APA. Under well-established principles of administrative law, such extra-procedural rule changes are unlawful and should be rescinded.

3. The Bureau's Failure To Explain The Basis For The New Rule Effectuated By The "Second Erratum" Renders That Rule Arbitrary And Capricious.

Under the APA, agency action is unlawful to the extent that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

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[15] Air Transport Ass'n of America v. Dep't of Transportation, 900 F.2d 369, 375 (D.C. Cir. 1990), remanded, 498 U.S. 1077 (1991).

[16] See Chamber of Commerce v. Occupational Safety & Health Admin., 636 F.2d 464, 470-71 (D.C. Cir. 1980). See generally Note, A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy, 43 U. Chi. L. Rev. 430, 439-40 (1976); Jordan, The Administrative Procedure Act's "Good Cause" Exemption, 36 Admin. L. Rev. 113, 116-17 (1984).

[17] Chamber of Commerce, 636 F.2d at 470.

law."[18] It is well-settled that "the requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result."[19] This requirement has particular import when an agency acts to change existing rules or policies. "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[20]

In this case, the "Second Erratum" is "intolerably mute" with respect to the reasons for the Bureau's sudden and unforeshadowed change in policy. Until November 8, 1995, the Commission adhered to its view that, regardless of the basis for satisfying the coverage requirements at the five-year point, all MTA licensees would be required to provide service to one-third of the population of the MTA within three years of license grant.

Then, on November 8, 1995, the Bureau decided, without warning or explanation, that MTA licensees would not have to meet any particular quantitative coverage benchmark, whether after five years or three. The Bureau characterized this change as a "clarification" of the existing rule. As demonstrated above, however, the Bureau's new "interpretation" of the coverage rule was in no way suggested by earlier Commission statements about the rule. Indeed, the Bureau's "interpretation" is directly contrary to the express language of the original rule. Yet the Bureau makes no effort to explain the basis for its new "interpretation" or to offer a reason for amending the rule. Thus, the "Second Erratum" fails to qualify as reasoned decisionmaking and, as such, it is arbitrary and capricious under the APA.

4. The New Coverage Rule Is Arbitrary And Capricious On Its Merits.

Finally, as a substantive matter, the Bureau's decision in the "Second Erratum" to allow 900 MHz SMR licensees to hold spectrum without meeting

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[18] 5 U.S.C. § 706(2)(A).

[19] Public Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993).

[20] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

any quantitative coverage benchmark is irrational and therefore arbitrary and capricious on the merits.[21]

Congress and the Commission have favored the use of spectrum auctions, in part, because they are thought to promote the development and rapid deployment of new technologies, products, and services to the public, and the "efficient and intensive use of the electromagnetic spectrum."[22] Presumably, auctions achieve this end by providing an economic incentive to the winning bidder to use the spectrum efficiently so that it can recover the cost of the spectrum as quickly as possible. As Congress has recognized, however, this presumption breaks down when the winning bidder values the spectrum for some anticompetitive reason (*e.g.*, to exclude competitors or competing services from the market).[23] For this reason, the Commission has imposed coverage, construction, and/or service requirements on various services in which licenses are awarded by auction.

The coverage requirement that the Bureau has changed in the "Second Erratum" was expressly intended to prevent the warehousing of valuable spectrum.[24] Under the Bureau's new rule, however, this concept is gutted. Licensees in this service now may warehouse spectrum, for at least five years, without making any effort to build-out or market an SMR system. The new rule, therefore, will inhibit the rapid provision of service to the public.

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[21] See Chevron U.S.A., Inc. v. Natural resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). The inquiry at the second step of Chevron overlaps analytically with the court's review under the APA's "arbitrary and capricious" standard. See, e.g., General Am. Trans., Corp. v. ICC, 872 F.2d 1048, 1053 (D.C. Cir. 1989) ("[T]he questions posed — has the Commission adopted an impermissible construction of the Act and is its ... policy arbitrary and capricious — are quite similar. Both questions require us to determine whether the Commission, in effecting a reconciliation of competing statutory aims, has rationally considered the factors deemed relevant by the Act."), cert. denied, 493 U.S. 1069 (1990); see also Silberman, Chevron — The Intersection Of Law And Policy, 58 Geo. Wash. L. Rev. 821, 827-28 (1990).

[22] 47 U.S.C. § 309(j)(2)(B); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order (rel. Apr. 20, 1994) ¶ 2.

[23] See H.R. Rep. No. 111, 103d Cong., 1st Sess. 256 (1993) ("[A]n incumbent service provider could submit a bid for a license in a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring. This would deny the public both the benefit of having access to the new service, and the benefits of competition.").

[24] See Second Report and Order ¶ 42 (without meaningful coverage requirements, applicants may seek SMR licenses "to block potential acquisition of the MTA license by an applicant who already provides substantial coverage in the MTA").

In short, the Bureau's new rule undermines the very purpose of using competitive bidding to grant 900 MHz SMR licenses. Given the Commission's own well-articulated concerns in this regard, and the need to prevent anticompetitive conduct in spectrum auctions, the rule change effectuated by the Bureau in the "Second Erratum" is arbitrary and capricious on its merits.

CONCLUSION

For the reasons set forth herein, RMD requests that the Commission, on review, rescind the Bureau's "Second Erratum" and reinstate the former coverage rules as adopted in the Second Order on Reconsideration and Seventh Report and Order.

Respectfully submitted,

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November 20, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Review was sent by U.S. mail, postage prepaid, this 20th day of November, 1995, to each of the following:

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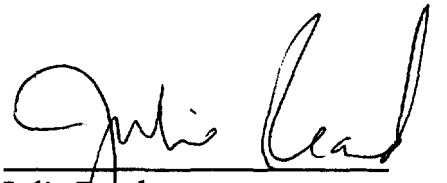

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